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In the
COPYRIGHT OFFICE
Washington, D.C. 20540

APR 26 2002

GENERAL COUNSEL
OF COPYRIGHT

In re
NOTICE AND RECORDKEEPING FOR
USE OF SOUND RECORDINGS UNDER
STATUTORY LICENSE

Docket No. RM 2002-1

REPLY COMMENTS OF INTERCOLLEGIATE BROADCASTING SYSTEM

I. INTRODUCTORY STATEMENT

The comments of others filed April 5, 2002, only confirm the Intercollegiate Broadcasting System's ("IBS") opening comments showing that in practice the Copyright Office's ("Office") published proposal would unjustifiably and discriminatorily burden small webcasters affiliated with educational institutions. The proposal should either be rejected or modified to exclude webcasters affiliated with educational institutions.

The "slightly revised" proposal¹ offered by the Recording Industry Association of America ("RIAA"), standing alone, does not materially reduce the direct and disproportionate burden on such webcasters. This recordkeeping burden is exacerbated by the Office's conscious and deliberate exclusion of small entities from the setting of compulsory license fees by the Copyright Arbitration Royalty Panel ("CARP") in Docket No. 2000-9 CARP DTRA 1 & 2. See Order of the Register, dated March 16, 2001. The Office is required to consider the cumulative

¹ RIAA Comments at 32.

impact on small entities of the proposed rules and the minimum rates arrived at in the concurrent CARP proceeding.

The adverse impact of the proposed rules on webcasters' use of small record labels will result in a diminution of the diversity of music available to the public, by denying the labels the public exposure necessary for the viability of such labels because of the disincentive to webcast performances created by the recordkeeping requirements.

To the extent the surviving webcasters could practicably continue to play such small labels and report such use, RIAA's comments fail to demonstrate that its so-called SoundExchange could practicably process reports of such plays and cost-effectively distribute the small per-label amounts of royalties to the large number of entities entitled to royalties from small-label performances.

Neither the proposal published by the Office nor the "slight" modification thereof proposed by RIAA in its comments comports with the purposes of the Regulatory Flexibility Act of 1980, 5 U.S.C. ch. 6, as amended, ("RFA"), as set forth in Section 2 thereof, 5 U.S.C. § 601 nt, nor would the record in this proceeding support the adoption of either in compliance with Section 604(a) of the RFA, 5 U.S.C. § 604(a). The argument that the instant rulemaking proceeding is not subject to the RFA, is unsound as a matter of statutory construction. Congress did not intend to exclude Office rules from application of the RFA. If the Office, in its rulemaking capacity, were to fall within the Congressional exemption in Section 2(a) of the Administrative Procedure Act ("APA"), its exercise of rulemaking powers would conflict either with the presentation clause of the Constitution or with the Constitutional requirement for separation of powers.

II. THE RECORDKEEPING PROPOSAL WOULD UNLAWFULLY BURDEN SMALL WEBCASTERS.

For the reasons described in the opening comments of IBS and others, the published proposal violates the public policy concerning the impact of Federal rules on small entities, as set down by Congress in Section 2 of the RFA, as amended, 5 U.S.C. § 601 nt. Such violation is in no way attenuated by the RIAA's "slight revision" of its original proposal. RIAA Comments at 32. The record in this proceeding simply provides an inadequate basis for the Office's adopting the recordkeeping rules, as proposed, because Section 604(a) of the RFA, 5 U.S.C. § 604(a), requires an agency

promulgat[ing] a final rule under section 553 of this title [APA Section 4 (Rule making)], after being required ... to publish a general notice of proposed rulemaking ..., the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain --

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rules and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

It is clear as a textual matter that Congress intended rulemakings in the Office to be subject to the RFA. Section 701(d) of the 1976 Copyrights Act ("1976 Act"), now 17 U.S.C. § 701(e), specifically provides that

all actions taken by the Register of Copyrights under this act are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

The Office's instant proposal to impose a recordkeeping requirement is clearly an action within the recordkeeping requirements provisions added to Sections 601(8) and 604(4) by Congress in P.L. 104-121 in 1996.

Any argument that the RFA should not apply to the Office because it is not an "agency" within the meaning of Section 2(a) (agency) of the APA, which is incorporated by reference in Section 601(1) (agency) of the RFA, 5 U.S.C. § 601(1), must be rejected. The exclusion of "the Congress" from the definition of "agency" in the APA has the intent and effect only to exempt Congress as a governmental authority from the APA. In Section 701(d) of the 1976 Act, Congress very explicitly and deliberately intended the Office to be subject to the APA, thereby limiting *pro tanto* the effect of the Congressional exemption. Moreover, Section 701(d) of the 1976 Act also specifies that Section 10 (Judicial review of agency action) of the APA, now 5 U.S.C., ch. 7 (Judicial review), shall apply to "all actions taken by the Register of Copyrights" under the 1976 Act. The exclusion of "the Congress" from the definition of agency for the purpose of Chapter 7 in 5 U.S.C. § 701(b)(1)(A), is essentially identical with that in Section 2(a) of the APA, now 5 U.S.C. § 551(1). Again in Section 701(d) of the RFA, Congress made it plain that the Office was not exempt from "judicial review of agency action," so the Office is included within the term "agency" throughout the APA.

The omission of any reference to the RFA (The Analysis of Regulatory Functions), in Section 701(d) of the 1976 Act does not of itself imply that Congress did not intend the Office to

be subject to the RFA. When Section 701(d) was enacted, the RFA had not yet even been enacted and could not have been referred to as Chapter 6 of Title 5.

Congress cannot be taken to have intended to exempt the rulemaking function of the Office under Section 701(d) of the 1976 Act from the RFA. Otherwise, the exercise of that quasi-legislative function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the presentment clause of the Constitution, Art. I, § 7, Cl. 2. See INS v. Chadha, 462 U.S. 919 (1983). Alternatively, if deemed non-legislative, then the exercise of that function by a part of "Congress" within the meaning of Section 2(a) of the APA, would violate the separation of powers.

Congress, in enacting Section 701 of the 1976 Act and later amending it in 1998 by P.L. 105-304, did not intend to so disregard the Constitutional issue. This is a case where "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.). Section 701(d) of the 1976 Act was inserted in response to the challenge to the Constitutionality of what became the 1976 Act in the course of the House hearings on H.R. 2223. In testimony before the House subcommittee on June 5, 1975,² Professor Brylawski previewed his law journal article arguing that Constitutionally the Office "must either be transferred to the executive branch or reestablished as an independent regulatory agency under the direction of a Register appointed by the President." See E. Fulton Brylawski: The Copyright Office: A Constitutional Confrontation, 44 Geo.Wash. L. Rev. 1, 47 (1975). In addition, chapter XV(7) of the Second Supplementary Report of the Register of Copyrights on the General Revision of the

² "Copyright Law Revision," Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, on H.R. 2223 (Serial No. 36, Part 1) at 459-67 (1975).

U.S. Copyright Law: 1975 Revision Bill (1975) relies on a legal memorandum of Kent Dunlap, a staff attorney, "The Effect of the Constitutional Principle of Separation of Powers on the Copyright Revision Bill," printed in the third volume of the 1975 House hearings, supra, at 2160-72. Mr. Dunlap's legal analysis obviously relied only on cases prior to August, 1975, in concluding that the separation of powers limited the placement outside the executive branch of only executive functions reserved to the President. Moreover, his memorandum was focussed on, if not limited to, quasi-judicial or adjudicatory functions.

The courts have adopted a functional analysis, rather than a formal analysis, so that the fact that the Office is part of the Library of Congress is not determinative of the classification of the Office to the legislative department of government. In rejecting Professor Brylawski's argument under the Appointments Clause, Art. III, § 2, cl. 2, in Eltra Corp. v. Ringer, Register, 579 F.2d 294 (1978), the Fourth Circuit adopted a functional analysis in reaching that result. It observed that

it would appear indisputable that the operations of the Office of Copyright are executive. * * * It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (I.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped code-wise under either the legislative or executive department[s]. But such code-grouping cannot determine whether a given function is executive or legislative. * * * The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office ***.

Id. at 301. Thus, whether the Library of Congress or the Copyright Office is part of Congress for the purposes of the APA Section 2(a) exemption cannot be determine *en grosse*, but must be determined function-by-function. Under the functional analysis, court decisions on the applicability of the Library of Congress at large are irrelevant to specific functions of the Office.

The Fourth Circuit's decision appeared to quiet the controversy until Bowsher, Comptroller v. Synar, 478 U.S. 714 (1986). That case returned the dialogue to the fundamental underpinnings of the separation of powers doctrine represented in the fear of "congressional usurpation of Executive Branch functions", i.e., "the fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Id. at 727, quoting Buckley v. Valeo, 424 U.S. 1 (1976). See Madison: 1 Annals of the Constitutional Congress 380 (1789), oft-quoted by the Supreme Court.

Upon the next legislative revisitation to the 1976 Act, this separation-of-powers concern seems to have led to the Leahy amendment,³ inserting new subsection in Section 107 of the 1976 Act, which became 17 U.S.C. § 701(b). The legislative rationale is described in House Conference Report No. 105-796 (1998) at 77 thusly:

The new subsection to be added to 17 U.S.C. Sec. 701 sets forth in express statutory language the functions presently performed by the Register of Copyrights under her general administrative authority under subsection 701(a). Like the Library of Congress, its parent agency, the Copyright Office is a hybrid entity that historically has performed both legislative and executive or administrative functions. Eltra Corp v. Ringer, 579 F.2d 294 (4th Cir. 1978). Existing subsection 701(a) addresses some of the latter functions. New subsection 701(b) is intended to codify the other traditional roles of the Copyright Office and to confirm the Register's existing areas of jurisdiction.

New subsection (b) seems designed to explicitly establish the "hybrid character" of the Office, Eltra Corp., supra, at 301, by "beefing up" the nominal legislative functions of the Office, thereby attempting to rationalize the Office's formal placement in the legislative department of government. Such attempted rationalization is thoroughly inconsistent with the functional approach utilized by the Fourth Circuit and should be rejected. In light of "the command of the

³ 144 Cong. Rec. S8389, S8397 (daily ed. July 16, 1998).

Constitution that the Congress play no direct role in the execution of the laws", Bowsher, supra, at 736, it is difficult to conceive that Congress meant to exclude the Office's rulemaking function from the RFA.

The inclusion of the Office in the Section 2(a) exemption for Congress would lead to the logically inescapable conclusion that if the Office's rule-making function is considered an act of "the Congress," then it violates the presentment clause, and if it is considered as an executive or administrative function it violates the separation of powers. See, generally, Jiles: "Copyright Protection in the New Millennium: Amending the Digital Millennium Copyrighted Act to Prevent Constitutional Challenges," 52 Admin. L. Rev. 443 (Winter 2000). While the Office, under jurisprudential principles, lacks the power to decide the Constitutionality of its own statute in this proceeding, it may avoid deciding the question by applying the RFA, as, we submit, Congress intended, including Section 603 (Initial regulatory flexibility analysis).

In applying the RFA in this proceeding, the Office is obliged to considered the cumulative impact of the recordkeeping requirements and the minimum fee schedule that was imposed by the discriminatory, one-size-fits-all, procedural rules imposed by the Office in Docket No. 2000-9 CARP DTRA 1&2. In the Register's order of March 16, 2001, the Register expressly and deliberately rejected the attempts by numerous small entities for a participatory role proportionate to their size. The Office began the hearing phase by apparently accepting the RIAA's urging that participation be limited to those who could participate fully "for a minimum of four days per week for a period of one month." Order of the Register, dated January 18, 2001, at 1, quoting RIAA Reply at 4. That order recognized the problem of small entities:

Finally, a review of the list of participants in this proceeding reveals a number of smaller-sized firms and concerns that desire to make use of the section 114 and

112 licenses. The Library has been contacted by several of these parties expressing concern over the costs associated with filing a written direct case and fully participating in the proceeding. They are particularly concerned that they will not know the extent of their financial exposure for payment of the arbitrators' charges until the proceeding is completed and have inquired as to whether there are ways to allow presentation of their views to the CARP while limiting both their costs of participating and their responsibility for payment of the arbitrators. Suggestions have included: waiving the requirement of filing written direct cases for these parties and allowing them to file written pleadings (in effect *amicus* briefs) at those junctures of the CARP proceeding related to their concerns; allowing these parties' written direct cases to be considered without oral hearings or testimony; and assessing the arbitrators' costs to smaller parties at a reduced rate or amount.

The Library does not express any opinion as to the advisability, or permissibility, or any of these suggestions. However, in the interest of conducting a proceeding that encourages participation and gathers the maximum amount of relevant evidence for the CARP's consideration, we solicit comments and proposals, if any, to address cost concerns for smaller-sized parties in this proceeding.

Id. at 4. But the Office did nothing to accommodate these concerns. In the March 16th order the Register declined any accommodation to small entities:

In the January 18, 2001, Order in this proceeding, the Library solicited comments regarding the participation of so-called "small parties" that do not submit written direct cases. Comments were received from Manning Broadcasting, Inc., SBR Creative Media, Inc., WCPE-FM, and the Performing Artists' Society of America favoring the submission of *amicus curae* briefs in lieu of written direct cases. The RIAA opposed such submissions.

Section 251.43(a) of the CARP rules provides that all parties to a proceeding must file a written direct case that contains testimony sponsored by a witness or witnesses. The purpose of this requirement is to allow full examination and cross-examination of all testimony before the CARP renders its determination. Full prosecution of the written direct cases is essential to compiling a complete and accurate record. In addition, it is the parties to a rate adjustment proceeding who bear the cost of the proceeding. 17 U.S.C. 802(h)(1).

Participation by non-parties through submission of *amicus* briefs does not appear to be consistent with these provision. The Library has serious reservations whether it, or the CARPs, possess the authority to allow such submissions under the current CARP regulations. While there may be some merit in the idea of accepting *amicus* briefs in CARP proceedings, the merits should be first explored through the rulemaking process.

Consequently, the Library will not allow such submissions by any persons or entities who are not full, active participants in this proceeding. We are sensitive to the concerns of those who cannot individually afford the cost of full participation, and encourage them to pool their resources with those in like circumstances for the submission of one or more joint written direct cases as permitted by the rules.

The exclusionary effect of the Office's ruling in practice was acknowledged in the March 16th order, where the Office admitted that

Many parties have filed Notices of Intent to Participate, and already a number of parties have formally withdrawn from this proceeding. The Library anticipates that additional parties will withdraw before the deadline for submitting written direct cases; and some will not file cases at all, requiring their dismissal from the proceeding.

Id. at 2. Copies of the January 18 and March 10, 2001, orders are appended hereto.

This sort of procedural inflexibility contradicts the spirit, if not the letter, of the RFA. Whether the procedural rules that were originally adopted for broadcast licensees are legally defensible with respect to that class or not, they are clearly not defensible as to small webcasters. The practical exclusion of a class of payors from the proceeding to determine the amount of their payments is plainly inconsistent with the Fifth Amendment to the Constitution. To add insult to injury, upon inquiry, interested small entities were informed by the Office that appeals to the Librarian were limited to parties fully participating in the arbitration proceeding. Small entities are excluded from appeals to the Librarian by Section 251.55 (post-panel motions) of C.F.R., Title 37, which limits appeals to "parties" to the proceeding. As a result no direct attack on the procedural rulings is contemplated or permitted by the Office.

Be that as it may, the Office is required in this proceeding to consider the cumulative burden of the recordkeeping requirements and the disproportionately high minimum fee on small webcasters.

III. CONCLUSION

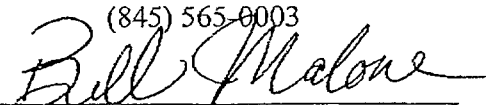
For the reasons stated in the opening comments by IBS and other small webcasters, the Office should not adopt the one-size-fits-all recordkeeping requirements proposed, unless webcasters affiliated with educational institutions are excluded therefrom.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

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by 
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Its Attorney

April 26, 2002

Attachments --

Orders in Docket No. 2000-9 CARP DTRA 1&2

-- January 18, 2001

-- March 16, 2001

J12202:WAH01775.DOC



In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2000-9 CARP DTRA 1&2

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ORDER

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On December 11, 2000, the Library of Congress published the schedule for CARP proceedings in the above-captioned matter. 65 FR 77393 (December 11, 2000). The schedule set the due date for written direct cases on or before February 5, 2001, with arbitration beginning on May 21, 2001. The Library has now received pleadings from parties in the proceeding who are dissatisfied with this schedule.

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A large group of parties known as the "Webcaster/Broadcaster Group" petitions the Library to push the schedule back for written direct cases until March 19, 2001, and initiation of the CARP until July 16, 2001. The National Religious Broadcasters Music License Committee and Salem Communications Corp. support the petition. The Recording Industry Association of America ("RIAA") supports these dates and urges the Library to establish that July 16, 2001, is the firm date for initiation and that July 17, 2001, will be the first day of hearings on RIAA's case. In addition, RIAA urges the Library to select only those arbitrators who will be able to hear written direct cases "for a minimum of four days per week, for a period of one month, beginning July 16, 2001." RIAA reply at 4.

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New Schedule

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The Library has considered the requests of the parties and is inclined to establish a new schedule. Before setting such a schedule, we make the following observations. First, this proceeding should have begun well over a year ago, but for repeated requests for additional time and the RIAA petition for rulemaking regarding the exemption for over-the-air radio broadcasts. We are now into the second period for rates for the section 114 and 112 licenses (2001-2002), with the first period (1998-2000) already passed. There is a need to commence this proceeding as soon as possible. Consequently, the schedule adopted today will be final, and no further requests for delays will be granted.

Second, it is obvious that this proceeding will be large and complex, with many hearing dates required. Scheduling such a proceeding does not depend solely upon the readiness of the parties. In order for the proceeding to be efficient and effective, considerable advance planning by the Library is required. Preparations must be made for the discovery period so that as many discovery matters as possible are resolved prior to the initiation of arbitration. In addition, qualified arbitrators must be identified who will be available for considerable hearing work.

Given these considerations, and the requests of the parties, the Library announces the new—and final—schedule:

ACTION	DATE
Negotiated Protective Order	March 28, 2001
Filing of Written Direct Cases	April 2, 2001
Requests for Underlying Documents Related to Written Direct Cases	April 11, 2001
Responses to Requests for Underlying Documents	April 18, 2001
Completion of Document Production	April 23, 2001
Follow-up Requests for Underlying Documents	April 30, 2001
Responses to Follow-up Requests	May 4, 2001
Motions Related to Document Production	May 10, 2001
Production of Documents in Response to Follow-up Requests	May 14, 2001
All Other Motions, Petitions and Objections	May 16, 2001
Initiation of Arbitration	July 30, 2001

Additional Matters

In addition to announcing a new procedural schedule, the Library calls the parties' attention to the following. First, in order for the discovery period to proceed effectively, a protective order must be in place before the start of the 45-day discovery period. Parties are encouraged to negotiate the terms of a protective order for submission to the Library no later than March 28, 2001. If the Library does not receive a negotiated protective order on or before that day, it will enter its own protective order governing the proceeding on the following day.

Second, the Library is aware that this proceeding involves a number of parties that have never before participated in a CARP proceeding. The Library therefore directs all parties to familiarize themselves with the CARP rules contained in part 251 of 37 C.F.R. **ALL PARTIES MUST COMPLY WITH THE CARP RULES.** The rules may be accessed via the Internet at www.loc.gov/copyright/title37. Any questions regarding filing procedures should be directed to the CARP Specialist at the Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington D.C. 20540. Telephone: (202) 707-8380. Telefax: (202) 252-3423. Improperly filed pleadings will not be accepted.

Third, with respect to the CARP rules, the Library emphasizes that all parties that filed Notices of Intent to Participate in this proceeding must submit written direct cases. 37 C.F.R. 251.43(a). It is permissible for a party to formally join the written direct case of another participant in lieu of filing its own written direct case. For parties filing their first written direct case in a CARP proceeding, it is recommended they consult written direct cases filed in prior CARP proceedings for format and organization. Copies of these cases are available for inspection and copying by appointment with the CARP Specialist at the Copyright Office at 101 Independence Avenue, S.E., Room 403, Washington, D.C. 20554. Requests for copies may be made, for a fee¹, from the CARP Specialist. The written direct cases are not available on the Copyright Office's webpage.

Written direct cases must be delivered to each of the parties in this proceeding on or before April 2, 2001. 37 C.F.R. 251.45(b)(2)(i). By this, we mean that each of the parties must have copies of everyone's written direct case by 5 p.m. on April 2, 2001. Copies must also be filed with the Copyright Office by this time. Mailing a written direct case on April 2 does not satisfy the rule, nor does delivering it after 5 p.m. The purpose of the rule is to assure that all parties have each other's written direct cases by the close of business on April 2 so that all will have an equal amount of time to prepare their requests for underlying documents. Failure to file a written direct case, or to properly serve it, are grounds for dismissal of the party from the proceeding.

Fourth, as discussed above, this proceeding is very complex and involves the establishment of rates and terms for two separate periods (1998-2000 and 2001-2002). In preparing their written direct cases, the parties are reminded to carefully distinguish between these two periods in organizing and presenting their evidence. As required by 37 C.F.R. 251.43(d), each party must state its requested royalty rates and terms for both periods. These requests may be amended at later points in the proceeding as provided by the rules.

¹ Fees for copies of documents made by Copyright Office staff are as follows: charge for time spent photocopying--\$65 per hour or fraction thereof. Charge per exposure--\$.40 per exposure photocopied. See 64 FR 29518, 29521 (June 1, 1999).

Finally, a review of the list of participants in this proceeding reveals a number of smaller-sized firms and concerns that desire to make use of the section 114 and 112 licenses. The Library has been contacted by several of these parties expressing concern over the costs associated with filing a written direct case and fully participating in the proceeding. They are particularly concerned that they will not know the extent of their financial exposure for payment of the arbitrators' charges until the proceeding is completed and have inquired as to whether there are ways to allow presentation of their views to the CARP while limiting both their cost of participating and their responsibility for payment of the arbitrators. Suggestions have included: waiving the requirement of filing written direct cases for these parties and allowing them to file written pleadings (in effect *amicus* briefs) at those junctures of the CARP proceeding related to their concerns; allowing these parties' written direct cases to be considered without oral hearings or testimony; and assessing the arbitrators' costs to smaller parties at a reduced rate or amount.

The Library does not express any opinion as to the advisability, or permissibility, of any of these suggestions. However, in the interest of conducting a proceeding that encourages participation and gathers the maximum amount of relevant evidence for the CARP's consideration, we solicit comments and proposals, if any, to address cost concerns for smaller-sized parties in this proceeding.

Wherefore, the above-described schedule for this proceeding **IS ADOPTED**. Comments and proposals regarding cost concerns for smaller-sized participants in this proceeding must be filed with the Copyright Office no later than February 1, 2001. Reply comments must be filed no later than February 12, 2001.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: 

William J. Roberts, Jr.
Senior Attorney

DATED: January 18, 2001



In the Matter of

Digital performance Right in Sound
Recordings and Ephemeral Recordings

}
}
} Docket No. 2000-9 CARP DTRA 1&2
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LIBRARY
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ORDER

The Library of Congress issues this Order to address certain matters in the above-captioned proceeding. These issues were discussed at the March 14, 2001, meeting with the parties.

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1. *New Precontroversy Discovery Schedule.* The Library is postponing the date for exchange of written direct cases to facilitate entry of the protective order in this proceeding. Adjustment of the date for written direct cases requires adjustment of the remaining precontroversy dates. The date for initiation of the CARP, July 30, 2001, and the date for submission of a negotiated protective order, March 28, 2001, remain the same.

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ACTION

DATE

Filing of Written Direct Cases

April 11, 2001

Requests for Underlying Documents
Related to Written Direct Cases

April 18, 2001

Responses to Requests for
Underlying Documents

April 24, 2001

Completion of Document Production

April 27, 2001

Follow-up Requests for
Underlying Documents

May 4, 2001

Responses to Follow-up Requests

May 10, 2001

Motions Related to Document Production

May 16, 2001

Production of Documents in Response to
Follow-up Requests

May 18, 2001

All Other Motions, Petitions and Objections

May 25, 2001

P.O. Box 70977
New
Washington
D.C. 20024

Telephone:
(202)707-8380

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(202)252-3423

2. *Protective Order.* As described above, the terms of a negotiated protective order must be submitted to the Library by close of business on March 28, 2001. The Library has before it a pending motion submitted by RIAA, AFTRA and AFM to accept a proposed protective order. One of the provisions of the proposed protective order is a requirement that all parties to this proceeding sign a non-disclosure certification for each category of protected materials. The Library finds this provision to be useful and will include it in the protective order that it enters on March 29, 2001. However, in order to enable signatures to be obtained on the certification forms prior to the exchange of the written direct cases, sufficient time is required after March 29, 2001. This is why the Library has postponed the schedule from April 2 to April 11 for the exchange of written direct cases.

Any party that has not executed a non-disclosure certification, as provided in the protective order to be issued on March 29, 2001, **by April 6, 2001**, will not be entitled to receive protected materials contained in the written direct cases as filed on April 11, 2001. However, a party is not precluded from executing a non-disclosure certification after this date in accordance with provisions set forth in the Protective Order, and following such execution will be entitled to receive copies of past and future protected materials.

3. *Notice of Intent to File Written Direct Case.* Many parties have filed Notices of Intent to Participate, and already a number of parties have formally withdrawn from this proceeding. The Library anticipates that additional parties will withdraw before the deadline for submitting written direct cases; and some will not file cases at all, requiring their dismissal from the proceeding. To avoid burdening the active participants in this proceeding from serving written direct cases on those parties that are not, or will not be active, the Library is requiring all parties that filed a Notice of Intent to Participate and that intend to file written direct cases to submit a Notice of Intention to Submit a Written Direct Case **no later than March 28, 2001**.

A Notice of Intention to Submit a Written Direct Case shall state the party's intention to file a written direct case on April 11, 2001, and to be an active participant in this proceeding. In addition, it shall provide the name and address of **one** person (counsel, or if not represented by counsel, the party) on whom copies of filings and submissions should be served. The names and addresses so provided shall comprise the service list for the remainder of this proceeding.

Any party that fails to file a Notice of Intention to Submit a Written Direct Case by March 28, 2001, shall forfeit the right to receive service copies of the written direct cases from the parties on April 11, 2001. Failure to submit a Notice, however, does not result in automatic dismissal from this proceeding. A party who fails to file this notice but who, in fact, files a written direct case on April 11, 2001, will be added to the service list. These parties must then be served with copies of the other parties' direct cases by 5

p.m., Friday, April 14, 2001. All parties must then adhere to the discovery schedule set forth in this Order.

4. *Service by the Copyright Office.* At the March 14, 2001, meeting with the parties, service of filings and pleadings on the parties was discussed. It was agreed that, where one counsel represented more than one party, the number of copies required to be served on that counsel would be worked out through individual agreements. There was not, however, a discussion on whom the Library will serve copies of the orders, announcements and decisions that the Library will issue in this proceeding. The Library's policy for serving these items will be as follows.

For those parties not represented by counsel, and for those parties represented by counsel that does not represent other parties in this proceeding, the Library will serve one copy of its orders, announcements and decisions. In the interests of saving costs, where the same counsel represents two or more parties to this proceeding, that counsel will receive only one copy of the Library's orders, announcements and decisions. The Library will not provide additional copies.

Likewise, the Office will not serve a party directly when that party is represented by counsel, nor will the Library serve more than one attorney for a party with copies of its orders, announcements and decisions. For this reason, each party must designate in its Notice of Intention to Submit a Written Direct Case a single attorney for purposes of service by the Library.

5. *Participation by small parties.* In the January 18, 2001, Order in this proceeding, the Library solicited comments regarding the participation of so-called "small parties" that do not submit written direct cases. Comments were received from Manning Broadcasting, Inc., SBR Creative Media, Inc., WCPE-FM, and the Performing Artists' Society of America favoring the submission of *amicus curae* briefs in lieu of written direct cases. The RIAA opposed such submissions.

Section 251.43(a) of the CARP rules provides that all parties to a proceeding must file a written direct case that contains testimony sponsored by a witness or witnesses. The purpose of this requirement is to allow full examination and cross-examination of all testimony before the CARP renders its determination. Full prosecution of the written direct cases is essential to compiling a complete and accurate record. In addition, it is the parties to a rate adjustment proceeding who bear the cost of the proceeding. 17 U.S.C. 802(h)(1).

Participation by non-parties through submission of *amicus* briefs does not appear to be consistent with these provisions. The Library has serious reservations whether it, or the CARPs, possess the authority to allow such submissions under the current CARP regulations. While there may be some merit in the idea of accepting *amicus* briefs in

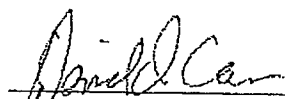
CARP proceedings, the merits should be first explored through the rulemaking process.

Consequently, the Library will not allow such submissions by any persons or entities who are not full, active participants in this proceeding. We are sensitive to the concerns of those who cannot individually afford the cost of full participation, and encourage them to pool their resources with those in like circumstances for the submission of one or more joint written direct cases as permitted by the rules.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY:



David O. Carson
General Counsel

DATED: March 16, 2001

Certificate of Service

I hereby certify that I have caused to be mailed this day copies of the
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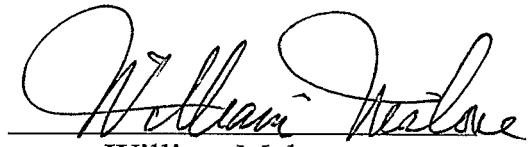
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June 6, 2002